

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF &  
APPENDIX**





76-1322

To be argued by:  
Marc A. Rosenberg

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PAS

UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

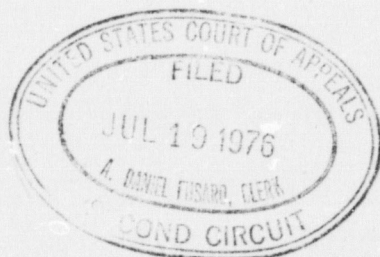
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Docket No.

\_\_\_\_\_  
In Re LAWRENCE BUFALINO,

A Witness Before the Grand Jury

\_\_\_\_\_  
On Appeal from the United States District  
— Court for the Southern District of New York

\_\_\_\_\_  
BRIEF AND APPENDIX FOR APPELLANT, LAWRENCE BUFALINO



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UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

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In Re LAWRENCE BUFALINO,

A Witness Before the Grand Jury.

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On Appeal from the United States District  
Court for the Southern District of New York

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BRIEF FOR APPELLANT

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Preliminary Statement

Larry Bufalino appeals from an order incarcerating him for civil contempt after a contempt hearing in the United States District Court for the Southern District of New York for failure to answer questions before the February 19, 1975 Special Grand Jury, after being conferred with use and derivative use immunity. The contempt hearing was held before the Hon. Edmond L. Palmieri, United States District Judge, on June 10, 1976, and the order being appealed from was executed by Judge Palmieri on the same date. Mr. Bufalino was immediately placed in federal custody where he

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today remains incarcerated in the Metropolitan Correctional Center in the Southern District of New York.

Judge Palmieri's order was not docketed or filed until July 12, 1976, on which date a notice of appeal was filed in behalf of Mr. Bufalino.

Issues Presented for Review

1. After being advised that he was expected to corroborate certain statements allegedly given by him to the Federal Bureau of Investigation, was Mr. Bufalino obligated to controvert the making of such statements before the February 19, 1975 Grand Jury, after being conferred with use and derivative use immunity when he was previously advised that he would be criminally prosecuted for perjury for failure to corroborate alleged statements previously given to the Federal Bureau of Investigation and when the immunity conferred did not preclude prosecution for alleged perjury?

2. Does the failure to docket and file the order incarcerating Mr. Bufalino for civil contempt for over a thirty-day period mandate his immediate release when Mr. Bufalino's counsel was estopped from filing a notice of

appeal until more than thirty days following the order of incarceration for civil contempt?

Statement of the Case

Mr. Bufalino was served with a Grand Jury subpoena on May 18, 1976, which required his appearance in the Southern District of New York on May 20, 1976.

On May 20, 1976, as required, Mr. Bufalino appeared in the United States Court House at Foley Square, and before his required appearance before the February 19, 1975 Special Grand Jury, was taken to the offices of Barbara Ambler, Esq., Special Attorney, United States Department of Justice, attached to the Organized Crime and Racketeering Section of the Joint Strike Force.

Mr. Bufalino had no attorney, and when taken to Mrs. Ambler's office requested to consult with an attorney before his appearance before the Grand Jury. Although Mrs. Ambler adjourned Mr. Bufalino's Grand Jury date to May 25, 1976, Special Agent Edwards of the Federal Bureau of Investigation, who was present with Mr. Bufalino and Mrs. Ambler, confronted Mr. Bufalino with the assertion that Mr. Bufalino had stated to Mr. Edwards in the presence of two other



F.B.I. agents that a certain individual had threatened another. Spontaneously, without counsel and in the presence of Mrs. Ambler, Mr. Bufalino denied the making of the incriminating statements against the said individual asserted by Special Agent Edwards.

Mr. Bufalino thereafter retained attorneys, and his Grand Jury appearance was given the adjourned date of Tuesday, June 1, 1976. On that date Mr. Bufalino and his attorney, Marc A. Rosenberg, Esq., met with Mrs. Ambler. Mrs. Ambler produced for Mr. Bufalino and Mr. Rosenberg an F.B.I. Memorandum Report (Form 302), wherein it was asserted that Mr. Bufalino had previously stated to agents of the F.B.I., in substance, that "Russell told Napoli that if he didn't make good on it he would bust him in the head and kick him in the nuts." Mrs. Ambler prohibited photocopying of the F.B.I. Memorandum Report. It was confirmed by Mrs. Ambler to Mr. Rosenberg that if Mr. Bufalino failed to corroborate the making of such a statement, that a perjury indictment would be lodged against him. Mr. Bufalino's Grand Jury appearance was put off by Mrs. Ambler until June 3, 1976.

Mr. Bufalino had on several occasions, several

months prior to service upon him of the Grand Jury subpoena, spoken with agents of the F.B.I. at his home in Williamsport, Pennsylvania. However, without counsel and spontaneously when confronted by Special Agent Edwards' assertion, denied the making of an incriminating statement against "Russell". Mr. Bufalino is the nephew of Russell Bufalino, whom Mr. Bufalino informs is a person the F.B.I. is anxious and eager to seek a criminal prosecution against.

On June 3, 1976, when Mr. Bufalino had, in fact, appeared before the Grand Jury, he asserted his Fifth Amendment privilege, was thereafter conferred with use immunity, and again asserted his Fifth Amendment privilege with regard to questions asked, which questions were to have Mr. Bufalino corroborate alleged statements made by him indicated in the in the Federal Bureau of Investigation Memorandum Report.

#### Argument

##### POINT I

THE COMPULSION OF TESTIMONY FROM THE APPELLANT  
IN THE CIRCUMSTANCES OF HIS CASE IS IN CONTRA-  
VENTION OF THE FIFTH AMENDMENT TO THE CONSTI-  
TUTION OF THE UNITED STATES.

The posture taken by the appellant is distinguish-  
able of the thrust of the holdings of the Supreme Court of



the United States in Kastigar v. United States, 406 U.S. 441 (1972), and United States v. Mandujano, \_\_\_\_ U.S. \_\_\_\_ (May 19, 1976); 19 CrL 3087.

In Kastigar, the high court held that use and derivative use immunity was sufficient to protect an individual's Fifth Amendment self incrimination rights, and that such immunity was co-extensive with such Fifth Amendment protections. In Mandujano, the Supreme Court stated that in the constitutional process of compelling Grand Jury testimony and protecting a witness' Fifth Amendment rights, assertions with regard to "perjury" matters were inapposite with the Grand Jury process; that a witness, simply put, was obligated to tell the truth.

The case at bar presents an important angulation from the judicial prism with reference to the above-stated high court decisions.

Mr. Bufalino, prior to being served with a Grand Jury subpoena, on several occasions gave answers to questions asked of him by several different agents of the Federal Bureau of Investigation, which questions and answers were asked and answered on several different dates as far back as, upon information and belief, February, 1976. When he appeared

as required when served with the Grand Jury subpoena he was confronted outside the Grand Jury room by an agent of the Federal Bureau of Investigation in front of the Special Strike Force Attorney conducting the Grand Jury inquiry with the assertion that he had made a certain statement to the Federal Bureau of Investigation. The appellant, who was confronted with this assertion without counsel and prior to his retaining counsel, spontaneously and contemporaneously denied ever making such a statement.

The Grand Jury inquiry was with reference to alleged violation of Title 18 United States Code Section 894, and perusal of such statute clearly evidences that the assertion by the Special Agent of the Federal Bureau of Investigation was a material matter to the success of the Grand Jury investigation, and consequently of great import to the Special Agent of the Federal Bureau of Investigation conducting the investigation. The point is manifest that Mr. Bufalino's spontaneous contradiction of Mr. Edwards' assertion evidences the problem of the compulsion of his Grand Jury testimony; particularly when considered in conjunction with the representation by the Special Strike Force Attorney that Mr. Bufalino would be charged with criminal perjury



should he negate the assertion by Special Agent Edwards before the Grand Jury.

The unfortunate reality of the matter to Mr. Bufalino was that if he should tell the truth and deny the statement attributed to him by Special Agent Edwards before the Grand Jury, that he would be criminally charged with perjury and would be faced with circumstances where a jury would have to resolve his position from that of Special Agent Edwards, whose posture would be supported by two other agents of the Federal Bureau of Investigation. Mr. Bufalino's only recourse was to corroborate the assertion of Special Agent Edwards, and unfortunately such corroboration, according to Mr. Bufalino, was not in accord with the truth.

One of the basic tenants behind the Fifth Amendment of the Constitution of the United States is that no individual be required to assist in his own prosecution, potential or otherwise. In the circumstances of the case at bar, where Mr. Bufalino was told that if he failed to corroborate the assertion of Special Agent Edwards that he would, in fact, be charged with perjury, it would be contrary to elements of our mode of jurisprudence to compel Mr. Bufalino to, in fact, testify and corroborate certain

statements purportedly and allegedly made to several agents of the Federal Bureau of Investigation. To give heed to Mr. Bufalino's problem is not to interfering or in any way obstruct the Grand Jury process. Under the doctrine espoused by the Supreme Court of the United States in United States v. Calandra, 414 U.S. 338 (1974), the agents of the Federal Bureau of Investigation could appear before the Grand Jury and relate to that body the statements attributed to Mr. Bufalino by Special Agent Edwards and the Memorandum Report of the Federal Bureau of Investigation. Mr. Bufalino's testimony, even assuming arguendo that it would corroborate the Special Agent's assertion, would not be vital or absolutely necessary. On the other hand, under the circumstances at bar to compel Mr. Bufalino to testify before the Grand Jury to answer questions which the Government seeks to corroborate alleged statements made by Mr. Bufalino in the Federal Bureau of Investigation Memorandum Report would compel Mr. Bufalino to, in fact, assist and predicate his own criminal prosecution. Weighing the factors and interests relevant to the case at bar, it appears apparent that due consideration should be given to Mr. Bufalino's circumstances where he in reality has no opportunity to



extricate himself from circumstances of incarceration except by way of assertion of Fifth Amendment rights.

POINT II

APPELLANT MUST BE FORTHWITH RELEASED FROM CUSTODY INASMUCH AS HE WAS ESTOPPED FROM FILING HIS NOTICE OF APPEAL IN CONTRAVENTION OF LOCAL COURT RULES.

The civil contempt order in the case at bar was not filed until July 12, 1976, more than thirty days following Mr. Bufalino's incarceration. Prior to that date counsel for the appellant on numerous instances attempted to have a notice of appeal filed in Mr. Bufalino's case. Inasmuch as this Court has a thirty-day rule for disposition in cases where an appellant is incarcerated, and inasmuch as the civil contempt order was not docketed within such period of time making such a determination an impossibility, it is respectfully submitted that Mr. Bufalino must be forthwith released from custody.

CONCLUSION

FOR ALL OF THE ABOVE REASONS, MR. BUFALINO  
SHOULD FORTHWITH BE RELEASED FROM INCARCERATION.

Respectfully submitted,

ROSENBERG, ROSENBERG,  
EHRlich & SCHUMINSKY  
Attorneys for Appellant,  
Lawrence Bufalino

MARC A. ROSENBERG,  
Of Counsel.



APPENDIX

1 WCSR

2 UNITED STATES DISTRICT COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 -----X

5 IN RE LAWRENCE BUFALINO, :

6 a witness before the : 76 Cr. Misc. No. 1  
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7 Grand Jury. :

8 -----X

9  
10 B e f o r e :

11 HON. EDMUND L. PALMIERI,

12 District Judge.

13  
14 New York, New York  
June 10, 1976

15  
16 A p p e a r a n c e s :

17 ROBERT B. FISKE, JR., Esq.,  
United States Attorney for the  
18 Southern District of New York;  
By: STEVE FRANKEL, Esq.,  
19 Assistant United States Attorney.

20 MARK ROSENBERG., Esq.,  
Attorney for Lawrence Bufalino.  
21  
22  
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25



THE CLERK: In the matter of Lawrence Bufalino, a witness before the Grand Jury.

MR. FRANKEL: For the Government, your Honor.

MR. ROSENBERG: For the defendant.

THE COURT: Mr. Frankel, I think it is you who have the laboring oar.

MR. FRANKEL: Yes, your Honor. I am here for Mrs. Ambler, who is presently engaged on trial before Judge Ward. She apologizes for not being here, but the Government is represented nevertheless.

The Government calls Mr. Charles Fink as their first witness.

CHARLES E. FINK, called as a witness by the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FRANKEL:

Q Mr. Fink, are you presently serving a function within this court building?

A Yes. I am the foreman of a Federal Grand Jury in the Southern District of New York, Strike Force, since February 1975.

Q Were you present in the Grand Jury last week on June 3, 1976, at about 2:42 p.m.?

1

A I was.

2

3

Q At that time, sir, was Special Attorney with the Strike Force named Barbara Ambler present and asking questions of a witness by the name of Lawrence Charles Bufalino?

4

5

6

7

A She was.

8

9

Q At that time, sir, was the Grand Jury making inquiries into a matter regarding one Russell Bufalino?

10

A Yes, sir.

11

12

Q Do you see Mr. Lawrence Bufalino in court today, sir?

13

A Yes, sir.

14

Q Would you indicate where he is seated, sir?

15

A There [indicating].

16

Q Indicating Mr. Bufalino?

17

A With his hand on his neck.

18

Q At the time that you were present in the Grand Jury on June 3, Mr. Fink, did Mrs. Ambler ask Mr. Bufalino certain questions regarding this investigation?

19

20

A She did.

21

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Q At that time, sir, did she not also confer immunity upon him based upon an order of Judge Palmieri?

23

A She did.

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Q I ask you if you would examine what I would ask

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WCSR

Fink

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be marked Government's Exhibit 1 for identification.

[Government's Exhibit 1 marked for  
identification.]

A This is it.

Q Sir, is there some indication on that order that  
it was a Grand Jury exhibit on June 3, 1976?

A There is a stamp marked on it.

Q Do you recall, sir, the immunity physically being  
conferred upon Mr. Bufalino in the Grand Jury on that day?

A I do.

MR. FRANKEL: Your Honor, I ask that Government's  
1 for identification be marked Government's 1 in evidence.

MR. ROSENBERG: I have no objection, your Honor.

[Government's Exhibit 1 received in evidence.]

Q Mr. Fink, do you recall, after immunity was  
conferred upon Mr. Bufalino by virtue of this order, what  
Mr. Bufalino's response was in the Grand Jury?

A He says, "I refuse to answer. I take the Fifth."

Q Do you recall at that time if Mrs. Ambler permitted  
Mr. Bufalino to leave the Grand Jury and show a copy of the  
order to his attorney at that time?

A I do.

Q Thereafter, sir, did Mr. Bufalino return to the  
Grand Jury room?

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A He did.

Q At that time what, if anything, did he say to the Grand Jury?

A He still refused to answer on the Fifth Amendment.

Q Thereafter was he directed to answer?

A He was, by me and by Miss Ambler.

Q Did he continue to refuse to answer?

A He continued to refuse.

Q Sometime shortly thereafter was he directed to come before his Honor, Judge Palmieri, in Part 1 of this court?

A He was.

MR. FRANKEL: I have no further questions.

MR. ROSENBERG: I have no questions of this witness, your Honor.

THE COURT: All right. Thank you very much.

THE WITNESS: You're welcome, sir.

[Witness excused.]

MR. FRANKEL: The Government calls Ann Dule.



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WCSR

Dule

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A N N D U L E , called as a witness by the Govern-  
ment, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FRANKEL:

Q Miss Dule, were you present in a Federal Grand  
Jury last week on June 3, 1976, at about 2:42 p.m.?

A Yes.

Q At that time what function were you serving in  
the Grand Jury?

A Shorthand Reporter.

Q Did you take the stenographic minutes regarding  
an investigation of one Russell Bufalino?

A Yes, I did.

Q At that time, Miss Dule, did you have occasion  
to see Mr. Lawrence Bufalino, seated at counsel table,  
present in the Grand Jury?

A Yes, I did.

Q I ask you, please, if you would examine this  
document --

MR. FRANKEL: Which I ask be marked Government's  
2 for identification.

[Government's Exhibit 2 marked for identi-  
fication.]

Q Will you examine this document, please. What

1 does that document represent to you, Miss Dule?

2 A This is the transcript of the testimony of  
3 Lawrence Charles Bufalino, taken on June 3, 1976, and I  
4 took the testimony.  
5

6 Q Have you had occasion since that time to compare  
7 your stenographic minutes with the notes that are Govern-  
8 ment's Exhibit 2 before you?

9 A Yes, I did.

10 Q Are those minutes a true and accurate copy as  
11 reflected in your stenographic notes?

12 A Yes, they are.

13 MR. FRANKEL: Your Honor, I now offer Govern-  
14 ment's 2 for identification as Government's 2 in evidence.

15 MR. ROSENBERG: I have no objection.

16 [Government's Exhibit 2 received in evidence.]

17 MR. FRANKEL: I have no further questions of  
18 this witness.

19 MR. ROSENBERG: I have no questions of this  
20 witness, your Honor.

21 THE COURT: Thank you.

22 [Witness excused.]

23 MR. FRANKEL: Your Honor, that is the Govern-  
24 ment's case for the purpose of the contempt hearing.

25 MR. ROSENBERG: Your Honor, I would like to



1  
2 call Agent Edwards.

3 MR. FRANKEL: Your Honor, I would ask for a  
4 showing of proof as to what Agent Edwards could possibly  
5 say to be of any assistance at this hearing. I believe  
6 the hearing only relates to whether or not Mr. Bufalino  
7 refused to testify after being given immunity.

8 THE COURT: What do you propose to establish by  
9 Agent Edwards?

10 MR. ROSENBERG: Your Honor, if you recall, we  
11 made a motion to quash the subpoena previous to Mr.  
12 Bufalino's Grand Jury appearance. When Mr. Bufalino ap-  
13 peared in Mrs. Ambler's office, the Assistant U. S. Attorney's  
14 office in this matter, he spontaneously contradicted a  
15 statement that Agent Edwards and another agent have es-  
16 tablished that Mr. Bufalino stated. That statement is  
17 at the heart of 18. U.S.C. Section 894, entitled "Collection  
18 or Extension of Credit by Extortionate Means." This Grand  
19 Jury is investigating one Russell Bufalino, a relative  
20 of Larry Bufalino. There is a statement there that is at  
21 the heart of this Grand Jury proceeding. Larry Bufalino  
22 at that time spontaneously stated that he never made such  
23 a statement and at a subsequent time in my presence read  
24 the 302 report of the FBI. In that report Mr. Bufalino  
25 stated also to Mrs. Ambler and myself that the report was

full of inaccuracies.

The thrust of our motion to quash, as well as Mr. Bufalino's refusal to testify in spite of the immunity granted to him, is that he would be indicted for perjury unless he confirmed such a statement, which he states unequivocally that he never made.

I would like to examine Agent Edwards and the other agent, I believe it is Agent Sadowsky, as to that alleged statement and other statements contained in his 302 report, and statements and questions that are at the heart of Section 894, and questions which were in fact proposed to Mr. Bufalino before the Grand Jury.

Mr. Bufalino finds himself in a position that if he does answer the questions truthfully he feels that there is almost a 99 per cent chance that he will in fact be indicted for perjury on things that he never in fact did state.

So he is either liable here for a contempt citation and to be incarcerated under civil contempt, or, in the alternative, to confirm a statement which he did not in fact state and in fact lied, or tell the truth and subsequently be indicted for perjury. He finds himself the victim of a double-edged sword in this matter, your Honor, and I would like to examine the FBI agents in



reference to that statement.

THE COURT: Do you wish to make any reply?

MR. FRANKEL: Your Honor, I don't think that there is any provision anywhere in the law that gives counsel the right to examine FBI agents relative to prior to the testimony of a witness before the Grand Jury. The only protection that the witness is guaranteed and afforded is that he should not be put in a position of making statements which might later incriminate him. Therefore, once immunity is given to Mr. Bufalino, as it was by virtue of your Honor's order, he is protected sufficiently.

The Government had indicated to him that they had certain reports of certain statements he had made. That was gratuitous, your Honor, and the Government had no obligation to do so. But to permit him to go further now, to examine prior to the time that Mr. Bufalino appears before the Grand Jury, just what in fact the Government does have by way of information, so that Mr. Bufalino could then tailor his story, is far beyond the provisions of the law, and I think Mr. Bufalino is not entitled to that at this time.

THE COURT: Yes, I agree. I decline to permit you to call any witnesses for the purpose of probing the Government's evidence with respect to any violation of

1 Title 18, Section 894, which deals with the collections  
2 or extensions of credit by extortionate means. That  
3 statute is not before me. There is no issue before me  
4 with respect to any violation of that statute. The sole,  
5 narrow issue before me is whether Lawrence Bufalino was  
6 properly the subject of an examination before the Grand  
7 Jury after he had immunity conferred upon him, and whether  
8 he persisted in being recalcitrant before the Grand Jury  
9 notwithstanding the conferring of the immunity pursuant  
10 to statute.  
11

12 The testimony and the exhibits offered this  
13 afternoon are abundant proof of the fact that Mr. Bufalino  
14 has persisted in refusing to give any testimony notwith-  
15 standing the immunity of which he was the beneficiary.

16 If and when the Government seeks to prosecute  
17 him for perjury, it will be time enough at that time to  
18 consider what his appropriate defenses may be. But so far  
19 as the present situation is concerned, he is under a clear  
20 obligation to testify or to risk imprisonment if he fails  
21 to do so.

22 MR. ROSENBERG: Your Honor, our position is that  
23 Mr. Bufalino has not in fact at all unlawfully refused to  
24 testify. Our position is that he is almost certain to be  
25 indicted for perjury should he not confirm the FBI agents'



statements.

THE COURT: That is a strawman that you raise. It is not before me. The order granting him immunity is proper. He was asked appropriate questions, he was given ample opportunity to confer with his attorney. All the proceedings that have taken place are entirely regular and in strict conformity with the applicable statutes. I don't see how you can pursue this line of defense, because there is no defense at all.

MR. ROSENBERG: Your Honor, we are raising that as a defense, although we realize that not many agree with us. But Mr. Bufalino finds himself in the posture that if he does in fact testify and tell the truth that he will in fact be indicted for perjury. And we feel that he does not have to subject himself, that the immunity does not cover that area, and that the Fifth Amendment still entitles him to not testify and not give evidence against himself, even when it comes to a perjury indictment.

We know for a fact that the Federal Bureau of Investigation has certain statements which Mr. Bufalino has spontaneously on two occasions denied making. Those same statements were the subject of the specific questions that the Grand Jury proposed to Mr. Bufalino when he did refuse to testify.

Should Mr. Bufalino testify and tell the truth as we know it, he is almost certain to be indicted for perjury. Should he refuse to testify, then we are here in a civil contempt proceeding, your Honor. We feel that Mr. Bufalino is in such position that no matter what he does he will be subject to incarceration.

THE COURT: I think you have distorted the law as well as the facts, and I am not at all persuaded by what you say. I don't think that he can conveniently conjure up this monster, the double-pronged hydra that places him in any such position. He has immunity and he won't testify, and he has to accept the sanctions.

I am sorry but I have no choice except to direct his incarceration until such time as he is willing to testify or until the expiration of the term of the Grand Jury, which I understand is August 19, 1976, unless that term is extended, whichever first occurs. You have gotten a copy of the proposed order --

MR. ROSENBERG: Yes, I did, your Honor.

THE COURT: -- which the Government has submitted.

Do you know of any reason, Mr. Frankel, why I should not sign this order at this time?

MR. FRANKEL: I do not, your Honor.



1 MR. ROSENBERG: Your Honor, I was wondering --

2 THE COURT: The statute specifically provides  
3 that these matters should be dealt with expeditiously.  
4

5 MR. ROSENBERG: Your Honor, could I approach the  
6 bench for a moment with the U. S. Attorney?

7 THE COURT: Yes, you can approach the bench.

8 May I have the prepared order, please?

9 Here is a signed order for this man's confinement.

10 Mr. Marshal, take him into confinement. Let  
11 him make a phone call.

12 MR. ROSENBERG: Thank you, your Honor.

13 MR. FRANKEL: Thank you very much, your Honor.

14 [Discussion off the record.]

15 THE COURT: I want to make this statement: that  
16 an application was made to the Court for bail pending appeal,  
17 and I decline to grant the application because I can see  
18 no appropriate basis for this appeal. I think it would be  
19 taken solely for delay, and I think that any appeal in this  
20 matter would be frivolous. Therefore, under the statute  
21 it is my duty not to grant bail, and I therefore decline to  
22 grant bail.  
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